

## INDEX

### CITATIONS

#### Cases:

	Page
<i>Burton v. United States</i> , 202 U. S. 344	4
<i>Carter v. McClaughry</i> , 183 U. S. 365	4
<i>Flemister v. United States</i> , 207 U. S. 372	4
<i>Gravieres v. United States</i> , 220 U. S. 838	4
<i>United States v. Oppenheimer</i> , 242 U. S. 85	4

(1)

# In the Supreme Court of the United States

OCTOBER TERM, 1937

UNITED STATES OF AMERICA, APPELLANT

v.

CAROLENE PRODUCTS COMPANY, A CORPORATION

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS

## MEMORANDUM BRIEF FOR THE UNITED STATES IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS

The indictment in this case, filed June 19, 1935, is in two counts, each of which is based upon Sections 61-63, Title 21, United States Code, otherwise known as the Filled Milk Act of March 4, 1923.

The first count alleges that on December 1, 1934, the defendant, Carolene Products Company, a corporation, wilfully, knowingly, fraudulently and unlawfully shipped in interstate commerce from Litchfield, Illinois, to the General Grocer Company, at the City of St. Louis, Missouri, an adulterated article, to wit, filled milk, in violation of the Filled Milk Act of March 4, 1923.

The second count alleges that on December 27, 1934, the defendant, Carolene Products Company, a corporation, wilfully, knowingly, fraudulently and unlawfully shipped in interstate commerce

from Litchfield, Illinois, to "N. Comensky Grocery Company, at the City of St. Louis, Missouri, an adulterated article, to wit, filled milk, in violation of the Filled Milk Act of March 4, 1923.

On June 26, 1935, the defendant filed a motion to quash the indictment on the ground, among others, that the matters and facts set out in the indictment are *res judicata*. The District Judge overruled this motion on July 7, 1937. Copies of the motion to quash and the Court's order are included in the certified typewritten record.

On July 12, 1937, a demurrer to the indictment was filed by the defendant, Carolene Products Company, and was sustained by the District Court. The Court based its decision solely upon the ground that the Filled Milk Act (U. S. C. Title 21, Secs. 61-63), upon which the indictment was founded, is unconstitutional. Its opinion referred to and adopted the reasoning of Judge FitzHenry of the same district in an opinion in a previous case between the same parties reported in 7 F. Supp. 500. The judgment of the court sustaining the demurrer was made and entered October 19, 1937. On November 18, 1937, the United States filed a petition for appeal, assignment of errors, and statement of jurisdiction. The Court signed the order allowing appeal on November 18, 1937. On November 29, 1937, the appellee filed a motion to dismiss the appeal on the ground that the decision of Judge FitzHenry, reported in 7 F. Supp. 500, is *res judicata* in the instant case.

## ARGUMENT

The motion to dismiss on the ground of *res judicata* refers to a previous case between the same parties in which a criminal information<sup>1</sup> in three counts was filed on July 8, 1931. The first count alleged that the defendant on February 18, 1930, wilfully, knowingly, fraudulently and unlawfully shipped in interstate commerce from Litchfield, Illinois, to B. K. Wilson, at the City of Muncie, Indiana, a certain adulterated article of food, to wit, filled milk, in violation of the Filled Milk Act of March 4, 1923. The second count alleged that the defendant on February 18, 1930, wilfully, knowingly, fraudulently and unlawfully shipped in interstate commerce from Litchfield, Illinois, to B. K. Wilson, at the City of Muncie, Indiana, an adulterated article of food, to wit, filled milk, in violation of the Filled Milk Act of March 4, 1923. The third count alleged that the defendant on November 12, 1930, wilfully, knowingly, fraudulently and unlawfully shipped in interstate commerce from Litchfield, Illinois, to some persons at the City of Louisville, Kentucky, whose names were not known, an adulterated article of food, to wit, filled milk, in violation of the Filled Milk Act of March 4, 1923.

The Carolene Products Company filed a demurrer to this information, which was sustained by

---

<sup>1</sup> A certified copy of this information is printed as an Appendix hereto.

time and place first aforesaid, was in imitation and semblance of, to wit, milk, cream, skim milk, condensed milk and concentrated milk, the said filled milk, to wit, the said "Carolene" not then and there being a distinct proprietary food compound not readily mistaken in taste for milk or cream, or for evaporated, condensed or powdered milk, or cream, and not being then and there a compound prepared and designed for feeding infants and young children and customarily used on the order of physicians and not being then and there packed in individual cans containing not more than sixteen and one half ounces, and bearing a label in bold type that the content is to be used only for said purpose, and not being then and there shipped in interstate commerce as aforesaid exclusively to physicians wholesale and retail druggists, orphan asylums, Child Welfare Associations and generally disposed of by them, which said delivery for shipment in interstate commerce as aforesaid of the said filled milk, to wit, the said "Carolene" was then and there unlawful and prohibited and in violation of the Act of Congress approved March 4, 1923 entitled "An Act to Prohibit the Shipment of Filled Milk in Interstate or Foreign Commerce"; contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

### THIRD COUNT:

And the said United States Attorney further here gives the Court to understand and be informed that "Carolene Products Company, a corporation, on, to wit, the Twelfth day of November, in the year of our Lord One Thousand Nine Hun-

dred Thirty, at, to wit, Litchfield, in the County of Montgomery, in the State of Illinois, in the said Southern Division of the Southern District aforesaid and within the jurisdiction of this court, did then and there wilfully, fraudulently and unlawfully ship in interstate commerce from Litchfield, in the said County of Montgomery, in the said State of Illinois, in said Southern Division of the Southern District aforesaid, to some person, persons, corporation and corporations, whose name and names are to the said United States Attorney unknown, at the City of Louisville, in the State of Kentucky, over the lines and routes of certain common carrier and common carriers, the name and names of said common carrier and common carriers being to the said United States Attorney unknown, a certain adulterated food product injurious to the public health, to wit, certain filled milk, to wit, five hundred fifty cases of sixteen ounce cans and one hundred fifty cases of eight ounce cans, the total number of said cans being to the said United States Attorney unknown, of "Carlene" being then and there a product of condensed and concentrated skim milk, to which there had therefore been added and with which there had theretofore been blended and compounded a certain fat and oil other than milk fat, to wit, cocoanut oil and fat, so that the resulting product, to wit, the said "Carlene" then and there, to wit, at the time and place first aforesaid, was in imitation and semblance of, to wit, milk, cream, skim milk, condensed milk and concentrated milk, the said filled milk, to wit, the said "Carlene" not then and there being a distinct proprietary food compound not readily mistaken in taste for milk or cream, or

for evaporated, condensed or powdered milk or cream, and not being then and there a compound prepared and designed for feeding infants and young children, and customarily used on the order of a physician, and not being then and there packed in individual cans containing not more than sixteen and a half ounces and bearing a label in bold type, that the content is to be used only for said purpose, and not being then and there shipped in interstate commerce as aforesaid exclusively to physicians, wholesale and retail druggists, orphan asylums, Child Welfare Associations, hospitals and similar institutions and generally disposed of by them, which said shipment in interstate commerce as aforesaid of the said filled milk, to wit, the said "Carolene" was then and there unlawful and prohibited and in violation of the Act of Congress approved March 4, 1923 entitled, "An Act to Prohibit the Shipment of Filled Milk in Interstate or Foreign Commerce"; contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

WHEREFORE, said United States Attorney in behalf of the United States prays the consideration of the court here in the premises and that due process of law may be awarded against the said Carolene Products Company, a corporation, in this behalf to make answer to the United States touching and concerning the premises aforesaid.

FRANK K. LEMON,  
*United States Attorney for the  
Southern District of Illinois.*

[Indorsement on Cover of Information]

No. 2234

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT  
OF ILLINOIS, SOUTHERN DIVISION

UNITED STATES OF AMERICA

v.

CAROLENE PRODUCTS COMPANY, A CORPORATION

CRIMINAL INFORMATION

Leave to file granted this 8th day of July, A. D.  
1931.

Let summons for Carolene Products Company,  
a corporation, in conformity with the statutory  
law of the State of Illinois (Paragraph 690 Ca-  
hill Illinois Revised Statute) returnable ten days  
after service thereof be issued, not later than  
July 20th.

LOUIS FITZHENRY, *Judge.*

Filed July 8, 1931.

S. T. BURNETT, *Clerk.*

FRANK K. LEMON, *U. S. Atty.*

(Certified copy)

UNITED STATES OF AMERICA

*Southern District of Illinois; ss:*

I, G. W. Schwaner, Clerk of the United States  
District Court in and for the Southern District  
of Illinois; do hereby certify that the annexed and  
foregoing is a true and full copy of the original

Criminal Information Filed July 8, 1931, *In the Matter of The United States of American vs. Caro-lene Products Company, a Corporation*, No. 2234, as fully as the same appears from the original thereof, now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Springfield this 7th day of December, A. D. 1937.

(Sgd) G. W. SCHWANER, Clerk.  
[SEAL] By (Sgd) JOSEPHINE C. SNYDERS,  
Deputy Clerk.

Judge FitzHenry, his decision being reported in  
7 F. Supp. 500.

Appellee's motion to dismiss is, we submit, clearly without merit. Even were his contentions a ground of dismissal, it is quite clear from reading the criminal information in the previous case that the violations charged therein were not the same as those alleged in the indictment in the instant case. Each shipment of filled milk in violation of the Filled Milk Act of March 4, 1923, obviously constitutes a separate crime. That the doctrine of *res judicata* or *autrefois acquit* is applicable only where the *same* offenses, both in law and in fact, are involved is well settled. See *United States v. Oppenheimer*, 242 U. S. 85, 88; *Burton v. United States*, 202 U. S. 344; 380; *Carter v. McClaughry*, 183 U. S. 365, 395; *Flemister v. United States*, 207 U. S. 372; *Gravieres v. United States*, 220 U. S. 338, 343.

For the reasons stated we respectfully submit that the motion to dismiss the appeal should be denied.

STANLEY REED,

Solicitor General.

BRIEN McMAHON,

Assistant Attorney General.

WILLIAM W. BARRON,

Special Assistant to the Attorney General.

WILLIAM GARBOE,

W. MARVIN SMITH,

DECEMBER 1937.

Attorneys.

## APPENDIX

[Certified Copy of Criminal Information in Previous Case]

IN THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN  
DIVISION

In the District Court of the United States within  
and for the Southern Division of the Southern Dis-  
trict aforesaid.

At the June 1931 Term of said Court in the year  
of our Lord One Thousand Nine Hundred Thirty-  
one.

Frank K. Lemon, United States Attorney in and  
for the Southern District of Illinois, who in this  
behalf prosecutes in the name of the United States  
and for the United States, comes hereinto said  
Court on this 8th day of July in the year of our  
Lord One Thousand Nine Hundred Thirty-one in  
his own proper person, and for the United States  
gives the said Court here to understand and be in-  
formed that the Carolene Products Company, a  
corporation, on, to wit, the Eighteenth day of Feb-  
ruary, in the year of our Lord One Thousand Nine  
Hundred Thirty, at, to wit, Litchfield, in the County  
of Montgomery, in the State of Illinois, in the said  
Southern Division of the Southern District afore-  
said, and within the jurisdiction of this Court, did  
then and there willfully, fraudulently and unlaw-  
fully ship in interstate commerce from the said  
Litchfield, in the said County of Montgomery, in  
the said State of Illinois, in the said Southern Divi-  
sion of the Southern District aforesaid, to one B.

K. Wilson, at the City of Muncie, in the State of Indiana, over the lines and routes of Railway Express Agency, a corporation, and a common carrier, a certain adulterated article of food injurious to the public health, to wit, certain filled milk, to wit, one case of "Carolene" being then and there a product of condensed and concentrated skim milk, to which there had theretofore been added and with which there had theretofore been blended and compounded a certain fat and oil other than milk fat, to wit, cocoanut oil and fat, so that the resulting product, to wit, the said "Carolene" then and there, to wit, at the time and place first aforesaid, was in imitation and semblance of, to wit, milk, cream, skim milk, condensed milk and concentrated milk, the said filled milk, to wit, the said "Carolene" not then and there being a distinct proprietary food compound not readily mistaken in taste for milk or cream, or for evaporated, condensed or powdered milk or cream, and not being then and there a compound prepared and designed for feeding infants and young children, and customarily used on the order of a physician, and not being then and there packed in individual cans containing not more than sixteen and a half ounces and bearing a label in bold type, that the content is to be used only for said purpose, and not being then and there shipped in interstate commerce as aforesaid exclusively to physicians, wholesale and retail druggists, orphan asylums, Child Welfare Associations, hospitals and similar institutions and generally disposed of by them, which said shipment in interstate commerce as aforesaid of the said filled milk, to wit, the said "Carolene" was then and there unlawful and prohibited and in violation of the Act of Congress ap-

croved March 4, 1923 entitled, "An Act to Prohibit  
the Shipment of Filled Milk in Interstate or For-  
eign Commerce"; contrary to the form of the stat-  
ute of the United States in such case made and  
provided and against the peace and dignity of the  
United States.

SECOND COUNT:

And the said United States Attorney further  
here gives the Court to understand and be in-  
formed that Carolene Products Company, a cor-  
poration, on, to wit, the Eighteenth day of Feb-  
ruary, in the year of our Lord One Thousand Nine  
hundred Thirty, at, to wit, Litchfield, in the County  
of Montgomery, in the State of Illinois, in the said  
Southern Division of the Southern District afore-  
said and within the jurisdiction of this Court, did  
then and there willfully, fraudulently and unlaw-  
fully deliver to Railway Express Agency, a corpo-  
ration, and a common carrier, for shipment in inter-  
state commerce from the said Litchfield, in the said  
County of Montgomery, in the said State of Illi-  
nois, in the said Southern Division of the Southern  
District aforesaid, to one B. K. Wilson, at the City  
of Muncie, in the State of Indiana, a certain adul-  
terated food product injurious to the public health,  
to wit, certain filled milk, to wit, one case of "Caro-  
lene", being then and there a product of condensed  
and concentrated skim milk, to which there had  
heretofore been added and with which there had  
heretofore been added and with which there had  
heretofore been blended and compounded, a cer-  
tain fat and oil other than milk fat, to wit, a cocoa-  
nut oil and fat, so that the resulting product, to wit,  
the said "Carolene" then and there, to wit, at the

## Cases—Continued.

	Page
<i>Hebe v. Shaw</i> , 246 Fed. 711, affirmed 248 U. S. 297—	7, 19, 20, 21
<i>Hill v. United States</i> , 248 U. S. 420—	18
<i>Hipolite Egg Co. v. United States</i> , 220 U. S. 45—	12
<i>Hoke v. United States</i> , 227 U. S. 308—	12
<i>Kentucky Whip and Collar Co. v. Illinois Central Railroad Co.</i> , 299 U. S. 343—	7, 11, 12, 16, 18
<i>McCormack &amp; Co. v. Brown</i> , 286 U. S. 131—	12
<i>McCrory v. United States</i> , 195 U. S. 27—	29
<i>Oregon-Washington R. &amp; N. Co. v. Washington</i> , 270 U. S. 87—	13
<i>Paoker Corp. v. Utah</i> , 285 U. S. 105, 111—	28
<i>People v. Carolene Products Co.</i> , 245 Ill. 166—	21
<i>Powell v. Pennsylvania</i> , 127 U. S. 678—	30
<i>Purity Extract Co. v. Lynch</i> , 226 U. S. 192—	22
<i>Reid v. Colorado</i> , 187 U. S. 137—	12
<i>Reiter v. State</i> , 109 Md. 235—	21
<i>Schollenberger v. Pennsylvania</i> , 171 U. S. 1—	18
<i>Seven Cases v. United States</i> , 239 U. S. 510—	12, 16
<i>South Carolina State Highway Dept. v. Barnicell Bros., Inc.</i> , No. 161, Present Term, Decided Feb. 14, 1938—	29
<i>State v. Emery</i> , 178 Wis. 147—	21
<i>United States v. Carolene Products Co.</i> , 7 Fed. Supp. 500—	1, 5, 9
<i>United States v. Delaware and Hudson Co.</i> , 213 U. S. 366—	12
<i>United States v. Hill</i> , 248 U. S. 420—	12
 Statutes:	
Act of May 29, 1884, 23 Stat. 31—	12
Act of March 2, 1895, 28 Stat. 963—	12
Act of June 29, 1906, 34 Stat. 584—	12
Act of June 30, 1906, 34 Stat. 768 (Pure Food & Drugs Act)—	12, 14, 15
Criminal Appeals Act of March 2, 1907, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682)—	2, 9
Act of June 25, 1910, 36 Stat. 825—	12
Act of March 1, 1913, 37 Stat. 699—	12
Act of March 3, 1917, 39 Stat. 1069—	12
Act of March 4, 1917, 39 Stat. 1165—	13
Act of October 29, 1919, 41 Stat. 324—	13
Act of March 4, 1923, c. 262, 42 Stat. 1486-7, U. S. C., Title 21, Sec. 61-63 (The Filled Milk Act)—	2, 5, 6, 9, 13, 17, 18, 21
Act of June 22, 1932, 47 Stat. 326—	13
Act of May 18, 1934, 48 Stat. 781—	13
 Miscellaneous:	
62 Cong. Rec. 7581—	15
Hearings on H. R. 6215, 67th Cong., 1st Sess. (Committee on Agriculture of House of Representatives)—	22, 23, 24, 25

## III

## Miscellaneous—Continued.

## Page

Hearings on H. R. 8086, 67th Cong., 2nd Sess. (Senate Committee on Agriculture and Forestry)-----	22, 23, 24, 25
McCollum, Dr. E. V., et al., <i>The Newer Knowledge of Nutrition</i> (1929 ed.), p. 134-----	14
Root, Dr. A. S., <i>Food Vitamins</i> (N. Car. State Board of Health, May 1931), p. 2-----	14
Rose, Dr. Mary S., <i>The Foundations of Nutrition</i> (1933), p. 237-----	14
Sherman, Dr. Henry C., <i>Chemistry of Food and Nutrition</i> (1933), p. 367-----	14
Sherman, Dr. Henry C., <i>The Meaning of Vitamin A</i> , in <i>Science</i> , Dec. 21, 1928, p. 619-----	14